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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 671

DAVE SCHNEIDER, doing business as DAVE SCHNEIDER WHOLESALE JEWELRY,

Petitioner,

vs.

CENTENNIAL INSURANCE COMPANY, a corporation.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Dave Schneider, doing business as Dave Schneider Wholesale Jewelry, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on August 20, 1957.

Opinion Below.

The opinion sought to be reviewed[1] is reported at 247 F. 2d 491.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 20, 1957. Petitioner's Motion for Rehearing, as well as for a Rehearing *en banc* in that Court, was denied on September 26, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

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[1]Included herein as Appendix "A".

Questions Presented.

I.

Was the court below entitled to select from the record and incorporate in its opinion merely those facts which tended to support its ultimate conclusion, incorrectly state facts, omit the consideration of material facts, and refuse to cure such incorrections and omissions when such were called to the Court's attention in a Motion for Rehearing duly filed?

II.

Was the court below authorized to ignore a fundamental and controlling principle of local law in the consideration of a problem, the resolving of which concededly called for the application of local principle?

III.

Was the court below justified in ignoring the principal issue presented by the litigants in the briefs in order to substitute its own judgment for that of the trial judge who decided the disputed factual issues?

IV.

Does Rule 52a, Federal Rules of Civil Procedure, have any force and meaning in the courts of the United States, or may it be warped and tortured so as to be accommodated to the wishes of an Appellate Court which desires to substitute its factual judgment for that of a trial court?

Importance of the Question and Why the Supreme Court of the United States Should Grant This Petition.

The opinion of the court below, in effect, changes the law of California insofar as it is to be applied in the Federal Courts. The opinion and the judgment therein is catastrophic to the hundreds, and probably thousands, of insurance policy holders such as Petitioner, who have paid, and will pay, enormously great premiums for the type of protection which Petitioner thought he had, and which he did have, under the law of California until the decision reached by the Honorable Court of Appeals for the Ninth Circuit. The opinion clears the way for the continued writing of insurance policies which on their face appear to afford protection to the policy holder, but under the decision of the court below amount, in effect, to mere scraps of paper. The insurance paying public of the State of California should not be laid open to victimization, and the opinion under attack constitutes a clear invitation to insurers to vitiate the true object and purpose of insurance protection by the employment of clever and ingenious draftsmanship. While the amount involved in this appeal is less than $20,000.00, there may be literally hundreds of thousands of dollars at stake in the ultimate disposition. The issue is grave from a social and economic standpoint and warrants the study and careful deliberation of the highest judicial authority in the land.

Statement of the Case.

Dave Schneider, your Petitioner, is an honorable wholesale jewelry merchant who has conducted his business in the City of Long Beach, California, for a period of many years. The goodness of his reputation has been admitted throughout these proceedings.

On December 3, 1954, Schneider put his jewelry samples, the value of which, including cases, was something over $26,000.00, into the trunk of his automobile and embarked on a visit to some of his retail customers. He called upon two of these customers, removed the jewelry from his automobile, and displayed the same to the retailers in their stores [R. 57-58]. After visiting the second customer, Schneider replaced the jewelry into the trunk of his car at approximately 2:00 p.m. and locked the trunk [R. 58-59]. He drove to the establishment of a third customer, a man by the name of Steltzer, but did not display the jewelry to that customer [R. 63]. He visited with Mr. Steltzer for a few minutes, and then drove to the store of a fourth customer, California Premium Service, located approximately four miles away [R. 70-71]. Traffic was very heavy on the thoroughfare which he traversed, and a period of approximately forty-five minutes was required to drive the distance [R. 70-71]. Schneider reached the latter establishment at 4:30 p.m., and there discovered that his two sample cases and his jewelry were missing from the trunk of his car [R. 70-71].

Plaintiff's testimony was to the effect that only twice was he outside his car without his jewelry, and on these two occasions, when he was away for less than one minute, his car was being watched at all times [R. 81, 83-85, 123].

Throughout these proceedings it has been conceded that the jewelry was stolen on the trip in question. Schneider does not know when the jewelry was taken; neither does the insurance company. The police were notified immediately after the discovery of the theft, and neither litigant was able to make proof as to when and in exactly what manner the jewelry thieves operated.

On August 5, 1954, Schneider had purchased from his adversary in this litigation, a so-called jewelry block floater insurance policy.[2] The annual premium was $597.21. The policy is called an "all-risk" policy, and is doubtless represented to be such by insurance brokers who market the contract to the premium paying public in California. If the opinion and judgment of the court below is finalized, the description becomes almost laughable. The policy is set forth *in haec verba* in Appendix B of Schneider's Petition for Rehearing in the court below.

The insuring provision, Paragraph 5 of the policy reads:

> "This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever except:"

and then follows, in fine print, thirteen exceptions, eight sub-exceptions, and fifteen conditions.

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[2]Printed in its entirety herein as Appendix "B".

Although the respondent pleaded many exceptions in defense of its obligation, including a valid one whereby Petitioner's recovery was limited to $15,914.50, the controversy has centered around exception (I) of Paragraph 5, hereinafter referred to as exception 5(I). This exception purported to, and according to the court below, did exclude coverage for theft if the theft occurred while Schneider was away from his automobile.

The court below neglected to point out that when theft was sought to be excluded, the word "theft" was used in the insurance contract. It was used in exception 5(A), and in exception 5(K), the words "theft or attempted theft" are used. *The words "theft" or "attempted theft" were not used in exception 5(I).* The court below read the words into the exception which reads as follows:

> (I) Loss or damage to property insured hereunder while in or upon any automobile, motorcycle or any other vehicle unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle. This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail.

The opinion under attack did not point out that the express language pertaining to theft or attempted theft was used in exceptions other than that quoted immediately above, and into which the court below wrote the language in order to turn Petitioner away empty handed.

REASONS FOR GRANTING THE WRIT.

I.

This Is a Case of First Impression and One of Far-Reaching Importance.

There is no other recorded opinion in which the problems are the same as presented here. Through the years insureds under automobile and fire insurance contracts have come to be protected because of extensive litigation in such matters, and wide-spread and uniform interpretation by the Courts. There is no such uniformity and standardization in the kind of contract now under consideration. The language utilized by the insurers in these so-called "all-risk policies" varies with the draftsmen for the particular carrier who may seek to afford the least protection to the insured by the inclusion of the most exceptions and the most ambiguity.

The established rule under California law as to the interpretation of insurance contracts is as follows:

> "If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage whether as of peril insured against, the amount of liability, or the person or persons protected, the language will be understood in its most inclusive sense, for the benefit of the insured."

Continental Casualty Co. v. Phoenix Const. Co. (1956), 46 Cal. 2d 423, 437-438;

Ensign v. Pacific Mutual Life Insurance Co. (Feb., 1957), 47 A. C. A. 887, 891.

This rule is fair. It is equitable. But the court below did not apply it. If applied in the case at bar, Petitioner would have recovered that for which he had paid.

The opinion in the court below neglected to include mention of Section 1641 of the California Civil Code, providing:

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, *each clause helping to interpret the other.*" (Italics ours.)

The application of this statute to this case should have meant that the consideration of the clauses in exceptions 5(A) and 5(K) wherein the words "theft" and "attempted theft" were used, would have led to the conclusion that exception 5(I), referring only to "loss or damage to property," was not intended to apply to theft. The court below, for a reason which we cannot understand, read into the words "loss or damage to property" the meaning, theft *of* property.

Why, in Heaven's name, should such a strange interpretation have been made in favor of the insuring party, the one who had the sole control over the language employed in its contract, one who was presumably able to engage the services of the most competent draftsmen, and one who, if it meant to include theft as an exception in Paragraph 5(I), could have used the words as easily as was done in the case of exceptions 5(A) and 5(K).

The court below characterizes the language of exception 5(I) as being clear and unambiguous and cites *Greenberg v. Rhode Island Ins. Co.* (1946), 66 N. Y. S. 2d 457, 459,

and *Princess Ring Co., Inc. v. Home Ins. Co.* (1932), 52 R. I. 481, 161 Atl. 292, 293. These decisions have nothing to do with California law which specifically states:

> "If semantically possible, the insured and not the insurer is to have the benefit of the doubt." (California cases cited, *supra.*)

It does not appear that in either of the cases cited, the point made was even raised, and it does not appear that in either of the two cases leaned upon by the court below, other parts of the insurance contract contained explicit wording as to theft, such as did the non-standard so-called "all-risk policy" involved in the case at bar.

Petitioner in this case was entitled to the application of California law—not Rhode Island law or New York law and he was entitled to have his insurance contract interpreted in the light of its own provisions and California statutes, and not according to fancied analogy between his contract and the detailed provisions of those not revealed in the cited authorities.

The opinion sought to be reviewed characterized the arguments of Petitioner's lawyers, as "clever." The characterization would, perhaps, be apt if the only facts were those which were set forth in the opinion, but although the omission was called to the Court's attention in a Motion for Rehearing, the Court has refused to make it known that exceptions 5(A) and 5(K) contain the explicit words "theft" or "attempted theft," and that exception 5(I) did not. We disclaim cleverness in our presentation. We submit that under any fair rule of inter-

pretation, especially the liberal and safeguarding rule of California, the intendments should have been resolved against the insurer, and that, hence, theft was not an excluded contingency under exception 5(1).

If the judgment of the Court of Appeals for the Ninth Circuit is permitted to stand, the premium paying public of California will receive no real and substantial protection for the premiums it pays.

II.

The Decision of the Court Below Is Clearly Wrong, and Rule 52a, Federal Rules of Civil Procedure, Was Mocked.

Assuming that exception 5(1) applied to theft, the trial court found, as a fact, that the admitted theft did not occur at a time when Schneider was away from his automobile. It was submitted to the trial court, and to the Appellate Court, that no other finding was possible under the law. It has been heretofore pointed out that Schneider could not prove when and where the theft occurred, and neither could the respondent.

Under California law, it is axiomatic that the burden of proof rests upon the insurer to establish that a loss occurred under such circumstances as to bring such loss within an exception or an exclusion of coverage. *Bebbington v. California Western States Life Ins. Co.*, 30 Cal. 2d 157, 180 P. 2d 183; *Rossini v. St. Paul Fire & Marine Insurance Co.*, 182 Cal. 415. In its reply brief in the court below respondent's first sentence reads "We have no quarrel with any of the well settled rules upon which plaintiff relies in his brief."

In this case where the existence or non-existence of coverage may be dependent upon the question of whether property was stolen at one time or another, and when neither litigant is able to prove the time contended for, the court below overturns the trial court's finding of fact and decides the issue *without a mention or a word* of a principle which we submit is controlling under California law, and that is, upon whom rested the burden of proof. To us, this omission of reference to a point to which a main portion of the briefs and arguments in the court below was directed, is completely inexplicable.

The opinion under attack reads like the concluding chapter of a story by A. Conan Doyle. While it is a careful opinion in its analysis of the facts, detective-like in its approach, its effect is to characterize the trial judge as a fool. The trial judge applied California law. He held that the insurer could not prove that the property was stolen while Petitioner was away from his automobile, and that since the insurer had the burden of proof, the finding had to be against the insurer. The intermediate court wrought an injustice to the trial judge. It did not cast him in a proper light. It made him appear idiotic. Reference was made to Rule 52a, the Court determining that such Rule gave it authority to overturn the trial court's finding of fact if it concluded that a mistake had been made. We have no quarrel with the right of the Court to interpret Rule 52a in this manner. We do most sincerely feel, however, and so submit, that the "mistake" which is contemplated under such interpretation of

Rule 52a, should be a "mistake" made in the application of legal principles to factual disputes.

Is it fair that the highest court in the land should permit its inferior court, in a decision of this nature, to disregard completely the arguments made by the litigants in their briefs on a controlling principle of local law, to-wit, the issue of burden of proof as to a fact about which there is mystery to both parties?

Conclusion.

No great Constitutional issue is here involved. Petitioner is not one who has sought the protection of the Fifth Amendment. There is no suggestion that he is a Communist. There is no important social problem of race relations involved. Schneider is just an ordinary American citizen with an ordinary lawsuit. Just as much as any alleged Communist or offended member of a minority group, he believes that he is entitled to a consideration of legal principles by the Supreme Court of the United States. He can, and will, if he must, survive the loss of $15,914.50. The integrity of the law is that which should be protected, even above and beyond innocent victims who may, in the future, be deluded into purchasing hybrid forms of insurance contracts such as that which is here involved. Courts should meet legal issues head-on. Opinions on appeal should recite all of the facts, not those only which tend to support the conclusion to be reached. If they do not do this, they should be reviewed. However unimportant the case may be from a relative standpoint, no honorable man, and no honorable lawyer, can justly feel

offense at the loss of his cause provided it is made apparent that all of his contentions have received consideration. In this case, an injustice has been done. It is respectfully submitted that this is a case wherein the deficiency of the opinion itself, its injustice to the trial judge, and its avoidance of discussions of the issues in the briefs, lends great weight to Petitioner's prayer for a hearing in his Supreme Court.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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JOHN A. LOOMIS,

Attorneys for Petitioner Dave Schneider, Doing Business as Dave Schneider, Wholesale Jewelry.

Of Counsel:

BETTS, ELY & LOOMIS,

SAMUELSON & BUCK.

APPENDIX "A."

United States Court of Appeals for the Ninth Circuit.

Centennial Insurance Company, a Corporation, Appellant, vs. Dave Schneider, Doing Business as Dave Schneider Wholesale Jewelry, Appellee. No. 15,337, Aug. 20, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS, Chief Judge BONE and CHAMBERS, Circuit Judges.

BONE, Circuit Judge.

Centennial Insurance Co. (hereinafter "Centennial"), defendant below, appeals from a judgment entered by the District Court. The action was brought by Dave Schneider, doing business as Dave Schneider Wholesale Jewelry, to recover on a policy of insurance issued by Centennial to appellee on August 15, 1954, and continuing in force for a period of one year. The claimed loss of jewelry and their carrying cases allegedly covered by the policy occurred on December 3, 1954.

On the morning of December 3, 1954, at about 10.00 A.M. appellee left his place of business. As a wholesale jeweler appellee traveled by car from retailer to retailer, carrying the jewelry to be displayed in two specially fitted cases which he carried in the trunk of his car. Following his lunch, he drove to Bruce Jewelers in Inglewood, California, removed the cases from the trunk of his car, took them into the jewelry store, displayed his line of jewelry, returned the cases to the trunk, and drove to Joy Jewelry Company, also in Inglewood.

Appellee did not remove his cases at Joy Jewelry Co. He did not enter the premises, but talked with one of the buyers at Joy, Mr. Stelzer, in front of the store so he could see his car. Appellee and Stelzer got into appellee's car, drove around the block and into a blind alley and parked appellee's car behind a new car (a Ford and hereinafter called "Ford") purchased by Stelzer for his wife. Both appellee and buyer apparently got into the Ford car, the buyer then showing appellee the dashboard equipment. Appellee testified he had locked his car, and adjusted the rear view mirror of the Ford so that he could see his car. The inspection of the Ford lasted from five to fifteen minutes. Appellee then returned to his car and drove about four miles to the store of another customer, California Premium Service.

The drive to California Premium Service took some forty-five minutes because of heavy traffic at that hour. Appellee parked his car close to California Premium Service and claims that he watched it at all times while talking to Mr. Nigro of California Premium Service, except for about one minute when he examined a diamond, and during this time Mr. Nigro watched appellee's car. It was after inspecting the diamond that appellee opened the car trunk to remove his cases, and found both cases were not there. Centennial was notified and the police called.

Appellee's car was a 1954 Cadillac Coup de Ville model. The trunk latch locked automatically when the trunk door or lid was closed. The trunk latch showed no evidence of tampering. The trunk lid was of the type which rises if not latched shut because of a spring mechanism. Testimony was conflicting as to how high the trunk lid would have to rise or would have to be raised up for appellee to notice it by looking into the rear view mirror. At trial

appellee testified it would have to be up all the way for him to see it in his rear view mirror. The jewelry cases were about 4½ feet tall, 2½ feet wide and 20 inches in depth, weighed about 25 pounds when empty, and about 65 pounds (counting the jewelry contents) on the day in question. Each case was on wheels to facilitate moving it. Counsel for Centennial elicited by questioning at trial (and strongly emphasizes in its brief in this Court) that between the time he left his place of business at 10:00 A.M. and the time he discovered the loss of the jewelry, about 4:30-5:00 P.M., appellee made no use of a rest room, the implication being that appellee probably did make use of a rest room during this seven hour period, forgot about it, and that it was during this time when the car would be out of his sight that the theft was committed.

Both parties seem to entertain the view that the loss was a result of a *theft*, and the District Judge found the jewelry to have been *stolen*. Major controversy centers on clause 5(I) of the policy, which reads:

"5. This policy insures against all risks of *loss of or damage to* the above described property arising from any cause whatsoever *except:*

* * * * * * * * *

"(I) *Loss or damage to property insured hereunder while in or upon any automobile*, motorcycle or any other vehicle *unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle.* This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail." (Emphasis supplied.)

Appellee argues that the language in the exception clause, (I), "* * * loss or damage *to* property while in or upon an automobile * * *," is ambiguous, and should be construed most strongly against Centennial. Appellee also asserts that "* * * loss or damage *to* property * * *" can mean only *damage to* property and does not include *theft* as a theft involves "loss *of*" property rather than "loss * * * *to*" property. Thus, says appellee, the exception clause does not apply in this case. This is a clever argument, and is indicative of the thoroughness with which counsel has represented appellee. However, we cannot accept the argument. We believe the language of the policy excepting "*loss or damage to* property" expresses the intention to except *theft of* property from an automobile on the terms therein stated, and not alone to except *damage* to property (assuming damage means something entirely different from theft). We are supported in this view by other decisions which have found similar language to be reasonably clear and unambiguous, and applied such language to cases of theft. *Cf.* Greenberg, v. Rhode Island Ins. Co., 1946, 66 N. Y. S. 2d 457, 459; Princess Ring Co., Inc. v. Home Ins. Co., 1932, 52 R. I. 481, 161 Atl. 292, 293.

It is appellee's further contention that direct testimonial evidence shows that the insured property was not taken from the car while appellee was out of the car since at all such times the car was watched and no one watching saw anyone open the trunk. From this appellee argues that he not only must have been, but that he was, in the car at the time of the theft. This apparently was the view of the trial judge as findings were made that the "* * * jewelry and sample cases and trays were stolen from the trunk of plaintiff's automobile at a time when the plaintiff was in such vehicle."

While testifying, appellee, over objection of Centennial's counsel, gave as his opinion to explain the occurrence of the loss, that it probably happened during the time that appellee was driving to California Premium Service after leaving Stelzer following examination of Stelzer's Ford. The traffic moved slowly, there were many stops. Appellee was of the opinion the thief (or thieves) somehow removed the cases and contents while his car was stopped, loaded them into another vehicle and made a getaway.

Centennial asserts that such a view of the "theft" must be rejected as "inherently incredible"; that the theft could not have happened while appellee was in the car without appellee being aware of its commission.

Under Rule 52(a) of the Fed. Rules Civ. Proc., a finding is clearly erroneous when, although there is evidence to support it, a reviewing court on reviewing the entire evidence is left with a definite and firm conviction that a mistake has been made. United States v. Gypsum Co., 1948, 333 U. S. 364, 395-396; Smyth, Collector of Internal Revenue v. Erickson, 1955, 9 Cir., 221 F. 2d 1, 4; Alaska Freight Lines v. Harry, 1955, 9 Cir., 220 F. 2d 272, 275. *Cf.* United States of America v. One 1950 Buick Sedan, 1956, 3 Cir., 231 F. 2d 219, 223, on drawing reasonable inferences from "basic facts."

After a complete study of the evidence we are left with the conviction that a mistake has been made. We reach this conclusion for two reasons. In the first instance, the testimonial evidence is not convincing that appellee or others with whom he did business that day could adequately *see* the trunk of the car at all times. Of particular interest is the testimony concerning the several minutes that appellee was inside the Ford examining it with Stelzer

of Joy Jewelry Co. If we take the testimony most favorable to appellee (as we are required to do) United States of America v. Comstock Extension Mining Co., Inc., et al., 1954, 9 Cir., 214 F. 2d 400, 403, we find these facts: the Stelzer Ford was parked in a blind alley; the front of appellee's Cadillac was parked closely behind the rear of the Ford; the rear end of the Cadillac was about parallel with the sidewalk running along a street which ran at right angles to the alley; appellee was in the front seat of the new Ford car attempting to watch the trunk of his car by looking into the rear view mirror while he also looked at the instrument panel of the Ford and talked with Stelzer; appellee testified that he couldn't see the back of his car "* * * very well, because the back was quite a ways back * * *;" appellee looked into the rear view mirror "* * * off and on * * *" as Stelzer showed him the panel in the Ford; appellee spent (by the most favorable testimony) five to seven minutes in the Ford.

We believe this testimony substantially derogates from appellee's insistence that he could see his car at all times. These facts are specially significant when considered with that part of appellee's theory which postulates that the thief (or thieves) in some way had procured a key which fitted the lock and could open the trunk with ease and dispatch. With a key to expedite opening, and with appellee having a poor view of the trunk, the trunk could have been opened, raised to a height sufficient to remove the cases, the theft completed and the getaway made without appellee being conscious of the crime. We believe that Centennial has shown by appellee's testimony that he did not always have a clear view of his car when not in it, so that the theft could have been committed while appellee

was not in the car and without appellee knowing of or seeing its commission.

We also believe that it is most doubtful that the two cases, with their contents could have been removed from the trunk while appellee was in the car without appellee being aware at the time that a theft was taking place, though he might not have been able to prevent its completion. We must remember that each case measured 4½ feet tall, 2½ feet wide and 20 inches deep, and weighed (with contents) sixty-five pounds each. Each case was in the trunk of an automobile so that the trunk lid would have to be raised to remove it. Evidence is not clear as to how high the trunk lid would have to be raised, but it would have to be raised at least 20 inches, as this is the minimum measurement of the cases. Probably the trunk would be opened wider so the thief (or thieves) could more easily take hold of the cases and remove them without dragging them across the car frame and edge of the trunk, which would shake the vehicle, make considerable noise, and alert the driver. And when a sixty-five pound weight is removed from the rear of a car, the car probably would move or sway sufficiently to arouse the driver to the fact that something is happening to his car; he will look about. And further, the thief (or thieves) must have shut the trunk with sufficient force to lock it shut as appellee testified that if not latched properly the trunk lid would rise, especially if he drove. Appellee testified that it did not rise while he drove that day, and that it was locked when he went to remove the cases at California Premium Service. Yet, through all of these possible steps which the thief (or thieves) would have taken to complete the theft, appellee was unaware of any noise, in, or unusual or surprising motions of the car.

But even if the appellee might not notice such events, drivers moving behind appellee would certainly have seen the thief (or thieves) and probably those drivers, when seeing a person (or persons) surreptitiously approach appellee's car and without any sign of approval by appellee remove two large cases and place them in another car or take them to the sidewalk, would sound their horns or call. But even if there was complete silence from all the other users of the road at that time, and even if the trunk could not be seen in the rear view mirror unless raised to its maximum height, the thief (or thieves) would have had to carry or wheel the cases to the sidewalk or to another vehicle, which would have given appellee an excellent opportunity to see at least part of the commission of the crime. A person (or persons) walking about in a busy street, even if traffic is temporarily halted, carrying or wheeling large cases would attract attention.

But the basic theory of appellee is that the theft was committed by removing the cases from his car and placing them in a getaway car while appellee was held up by slow moving traffic. This directly conflicts with appellee's theory that the crime was accomplished this way so that a fast escape could be made. If traffic was "bumper to bumper," (as appellee testified) so that appellee could not move speedily, it seems clear that a speedy getaway of the thieves would be impossible.

Centennial has shown by the testimony of appellee himself that he could not see his car clearly at all times when he was out of it. This overcomes appellee's assertion that the theft was committed while appellee was in the car as he could observe the car at all times and no one removed anything from the trunk while he watched it. And we believe that appellee's own theory of the theft is incredible.

After reviewing the entire record we entertain the firm and definite conviction that a mistake was made by the trial court. On the basis of all the evidence in this case, we believe that in finding that the jewelry was stolen from the car trunk at a time when appellee was in such vehicle, the lower court bridged an impassable chasm with an assumption.

The cause is remanded to the District Court with instructions to vacate the judgment and to enter judgment that appellee take nothing.

(Endorsed:) Opinion. Filed Aug. 20, 1957.

Paul P. O'Brien, Clerk.

APPENDIX "B."

JEWELERS' BLOCK FLOATER

Attached to and forming part of Policy Number 2WF 4871 issued to Dave Schneider dba Dave Schneider Wholesale Jewelry. Amount $40,000.00. Premium $597.21.

1. IN CONSIDERATION OF the premium above specified, and of the Proposal(s) and Declaration (s) dated the 15th day of August, 1954, attached hereto and made a part hereof and which is (are) hereby agreed to be the basis of this policy, and which the Assured hereby warrants to be true as to each and every statement and particular contained therein,

THIS COMPANY DOES INSURE:

Dave Schneider dba Dave Schneider Wholesale Jewelry, herein called the Assured, whose address is 205 East Broadway, Long Beach, California and whose premises are located at same from the 15th day of August 1954 to the 15th day of August 1955 both days at noon, standard time at place of issuance.

LIMITATIONS OF LIABILITY

2. The maximum liability of the Company resulting from any one loss, disaster or casualty is limited to

(A) $40,000.00 in respect of property at the Assured's premises as described herein;

(B) $20,000.00 in respect of property which is (1) in transit by first class registered mail, or railway express (subject to the stipulations of Exclusion (E) of Section 5), or by armored car service; (2) deposited in the safe or vault of a bank or safe deposit company; (3)

in the custody of a dealer in property of the kind insured hereunder not employed by or associated with the Assured, but property deposited for safe keeping with such a dealer by the Assured or its authorized representatives while traveling is subject to the limit expressed in Clause E of this Section;

(C) $2,000.00 in respect of shipments by first class registered air mail or air express (subject to the stipulations of Exclusion (E) of Section 5) sent to any one addressee at any one address during any one day;

(D) $500.00 in respect of shipments in transit by customer parcel delivery service and the parcel transportation service of railroads, waterborne or air carriers and passenger bus lines (subject to the stipulations of Exclusion (E) of Section 5);

(E) $15,000.00 in respect of property elsewhere and not included in Clauses (A), (B), (C) and (D) above or otherwise limited herein.

PROPERTY INSURED

3. The Property Insured is as Follows:

(a) Pearls, precious and semi-precious stones, jewels, jewelry, watches and watch movements, gold, silver, platinum, other precious metals, and alloys and other stock usual to the conduct of the Assured's business, owned by the Assured.

(b) Property as above described, delivered or entrusted to the Assured by others who are not dealers in such property or otherwise engaged in the jewelry trade;

(c) Property, as above described, delivered or entrusted to the Assured by others who are dealers in such property or otherwise engaged in the jewelry trade, but

only to the extent of the Assured's own actual interest therein, because of money actually advanced thereon, or legal liability for loss of or damage thereto.

TERRITORIAL LIMITS

4. The property described above is covered anywhere in, and in transit within and between, the Continental United States of America, Alaska, Canada, the Hawiian Islands and Puerto Rico, but subject always to the limitations, conditions, exclusions and exceptions stated herein.

INSURING CONDITIONS

5. This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever except:

(A) Loss, damage or expense caused by or resulting from sabotage, theft, conversion or other act or omission of a dishonest character (1) on the part of the Assured or his or their employees, or (2) on the part of any person to whom the property hereby insured may be delivered or entrusted by whomsoever for any purpose whatsoever, unless such loss arises while the goods are deposited for safe custody by the Assured, officer of the corporation, member of the firm or salesman while traveling, or while the goods are in the custody of (a) the Post Office Department as first class registered mail, or (b) a carrier mentioned in Section 2, or (c) a person serving as a mere porter or helper not on the payroll of the Assured.

(B) Loss or damage caused by delay, loss of marker, gradual deterioration, moth, vermin, inherent vice or insufficient or defective packing, or damage sustained while the property is being actually worked upon and directly resulting therefrom.

(C) Loss or damage caused by or resulting from

(1) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack. (a) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (b) by military, naval or air forces; or (c) by an agent of any such government, power, authority or forces;

(2) any weapon of war employing atomic fission or radioacti force, whether in time of peace of war;

(3) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

(D) Loss or damage occurring at the Assured's premises as stated herein caused by or resulting from earthquake or flood (meaning rising navigable waters). However, if the peril of fire is not excluded hereunder this policy will cover fire damage occurring during or resulting from such earthquake or flood.

(E) Loss or damage occurring in course of transit to shipments by

(1) mail unless registered first class;

(2) express unless by railway express (including air division thereof) provided, however, that a package of a value of $1,000 or more sent by the Assured, its officers, agents, servants or employees, is not covered unless it is sealed with wax or lead and unless a special declaration of value is made to the carrier amounting to not less

than 10% of the actual value of the contents of the package. In no case need such declared value exceed $1,000;

(3) railroad, waterborne or air carriers unless under receipt of their passenger parcel transportation or baggage services;

(4) motor carriers or truckmen other than under receipt of:

(a) those operating exclusively as a customer parcel delivery service;

(b) armored car service;

(c) the parcel transportation or baggage services of passenger bus lines.

(F) Breakage of articles of a fragile or brittle nature, unless caused by fire, lightning, explosion, aircraft, vehicles, flood, earthquake, windstorm, strikers, rioters, persons taking part in labor disturbances or civil commotions, burglars, thieves or accident to the conveyance in which the property insured is being carried (but only when and to the same extent that such perils are otherwise covered under this policy).

(G) Loss or damage to goods sold on the installment plan from the time they leave the Assured's custody.

(H) Loss or damage while the property is being worn (except watches worn solely for the purpose of adjustment) by the Assured, officer of the corporation, member of the firm, director, agent, employee, servant or messenger of the Assured, or by any dealer or other person, firm or corporation engaged in the jewelry trade or by any of their officers, directors, agents, employees, servants or messengers or by any member of the family, relative of friend of any of the aforesaid, or while in their custody for such purpose.

(I) Loss or damage to property insured hereunder while in or upon any automobile, motorcycle or any other vehicle unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle. This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail.

(J) Loss or damage to the property hereby insured while at any exhibition promoted or financially assisted by any Public Authority or by any Trade Association.

(K) Loss of or damage to property contained in show windows at the Assured's premises by theft or attempted theft accomplished by or resulting from the smashing or cutting of such windows except as may be endorsed hereon.

(L) Loss of or damage to property exhibited by the Assured in show cases or show windows elsewhere than at the premises of the Assured as referred to in this policy except as may be endorsed hereon.

(M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory. Nor shall this policy cover any shortage in goods claimed to have been forwarded in a package when the package is received by the consignee in apparent good order with seals unbroken, nor for loss of or damage to goods when sent "C.O.D." with the privilege of inspection by the consignee before delivery.

6. To the extent of 10% of the limit of liability stated in Section 2 as applicable at such premises this Company will pay for damage (except by fire) to that part of the building occupied by the Assured directly resulting from

theft or any attempt thereof provided the Assured is the owner of such premises or is legally liable for such damage, but in no event shall this section apply to glass or to any lettering or ornamentation thereon. The Company's combined liability under this section and under Item (A) of Section 2 shall not exceed the amount of insurance shown under Item (A) of Section 2 for the premises at which such loss or damage occurs.

7. No assignment of or change of interest under this policy shall bind the Company, nor shall any change in or additions to the premises of the Assured stated in this policy be covered hereunder, unless the consent of the Company shall be endorsed hereon. No agreement, condition, or declaration of this policy shall be waived or changed, except by endorsement countersigned by a duly authorized agent of the Company. No notice to, or knowledge possessed by any agent or any other person shall be held to effect a waiver or change in any part of this policy unless endorsed hereon and signed as above provided.

8. It is a condition of this insurance that

(A) The Assured will maintain a detailed and itemized inventory of his or their property and separate listing of all travelers' stocks, in such manner that the exact amount of loss can be accurately determined therefrom by the Company.

(B) The Assured will maintain during the life of this policy, insofar as is within his or their control, watchmen and protective devices as described in his or their proposal form or in endorsements attached hereto.

9. (A) The Company shall not be liable beyond the actual cash value of the property at the time of any loss or damage and the loss or damage shall be ascertained or

estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed the lowest figure put upon such property in the Assured's inventories, stock books, stock papers or lists existing at the time the loss occurred, nor the cost to repair or replace the same with material of like kind and quality. Any antiquarian or historical value attaching to the said property shall be excluded from the estimate of loss or damage.

(B) Claims in respect of loss of or damage to pledged articles shall be limited to the amount actually loaned and unpaid plus the interest thereon at legal rates accrued at date of loss.

10. In case of loss of or damage to property of others held by the Assured, for which claim is made upon the Company, the right to adjust such loss or damage with the owner or owners of the property is reserved to the Company and the receipt of such owner or owners in satisfaction thereof shall be in full satisfaction of any claim of the Assured for which such payment has been made. If legal proceedings be taken to enforce a claim against the Assured as respects any such loss or damage, the Company reserves the right at its option without expense to the Assured, to conduct and control the defense on behalf of and in the name of the Assured. No action of the Company in such regard shall increase the liability of the Company under this policy, nor increase the limits of liability specified in Section 2 hereof.

11. It is understood and agreed that any insurance granted herein shall not cover (excepting as to the legal liability of the Assured), when there is any other insurance which would attach if this policy had not been issued, whether such insurance be in the name of the Assured or of any other third party. It is, however, understood and

agreed, that if under the terms of such other insurance (in the absence of this policy) the liability would be for a less amount than would have been recoverable under this policy (in the absence of such other policy) then this policy attaches on the difference.

12. This insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee.

13. In the event of loss or damage, or of anything likely to result in a claim under this policy, the Assured shall give immediate notice in writing to the Company, protect the property from loss or damage, furnish a complete list of the lost or damaged property stating the market value and cost of each article and the amount claimed thereon; and the Assured shall within sixty (60) days after a loss (unless such time is extended in writing by the Company), render to the Company a proof of loss signed and sworn to by the Assured, stating the knowledge and belief of the Assured as to the following. The time and cause of the loss or damage, the interest of the Assured and of all others in the property affected, the cash value of each item thereof, and the amount of loss of or damage thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of such property and shall furnish a copy of all the descriptions and schedules in all such insurance policies if required.

14. The Assured as often as may be reasonably required shall submit, and so far as is within his or their power shall cause all other persons interested in the property and members of their households and employees to submit to examinations under oath by any persons named by the Company relative to any and all matters in connection with a claim and subscribe the same, and shall produce for examination all books of account, bills, in-

voices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representatives, and shall permit extracts and copies thereof to be made. No such examination under oath or examination of books or documents, nor any other act of the Company or any of its employees or representatives in connection with the investigation of any loss or claim herein under, shall be deemed a waiver of any defense which the Company might otherwise have with respect to any such loss or claim, but all such examinations and acts shall be deemed to have been made or done without prejudice to the Company's liability.

15. There shall be no abandonment to the Company of any property but the amount of loss or damage for which the Company may be liable shall be payable sixty (60) days after satisfactory Proof of Loss as herein provided, is received by the Company.

16. It is understood and agreed that if in case of loss the Assured shall acquire any right of action against any individual, firm or corporation for loss of or damage to the property insured hereunder, the Assured will, if requested by the Company, assign and transfer such claim to the Company or, at the Company's option, execute and deliver to the Company the customary form of loan receipt, upon receiving payment for loss or advancement of funds in respect of the loss and will subrogate the Company to or will hold in trust for the Company, all rights and demands of every kind, respecting the same, to the extent of the amount paid or advanced, and will permit suit to be brought in the Assured's name at the expense of the Company.

17. In case of any loss or damage of any kind whatsoever, it shall be lawful and necessary, for the Assured or

his, or their factors, servants or assigns to sue, labor and travel for, in and about the defense, safeguard and recovery of the aforesaid subject matter of this insurance or any part thereof without prejudice to this insurance or waiver of the Assured's rights hereunder.

18. No suit, action or proceeding for the recovery of any claim under this policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the State within which this policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such State to be fixed herein.

19. It is agreed that the sum hereby insured shall be reduced by the amount of any loss covered by this policy, and that the maximum limits of liability applicable to the loss, shall likewise be reduced by the amount of all losses. Such reductions shall take effect as of the date of the occurrence from which the loss arises. The amount of loss, for the purpose of this clause, shall include any amount due to the Assured and any sums paid as rewards for the recovery of insured property, or otherwise. However, the full amount insured shall be reinstated automatically and a pro rata additional premium shall be payable from the date of the occurrence. Pending adjustment of any loss, payment of the premium for reinstatement of the amount thereof may be deferred until the amount of the loss has been fixed and the precise amount of the reinstatement premium is known.

20. This entire policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject hereof or

in case of any fraud, attempted fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

21. This policy may be canceled by the Assured by mailing to the Company written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the Company by mailing to the Assured at the address shown in this policy or last known address written notice stating when not less than five (5) days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Assured or by the Company shall be equivalent to mailing. If the Assured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the Assured.

22. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

(Signed) Jack Grand Agent.
Jack Grand
Insurance
Heartwell Bldg.
Long Beach 2, Calif.